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In the Matter of 1998 Biennial Regulatory Review – Reform of the International Settlements Policy and Associated Filing Requirements	IB Docket No. 98-148
Regulation of International Accounting Rates	CC Docket No. 90-337

COMMENTS OF SBC COMMUNICATIONS INC.

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TABLE OF CONTENTS

SBC Communications Inc. ("SBC") respectfully submits the following comments on the Commission's Notice of Proposed Rulemaking ("Notice")[1] in the above docket, in which the Commission proposes several changes to, and solicits discussion on, its International Settlements Policy (ISP) and associated rules.

I. INTRODUCTION AND SUMMARY

SBC fully supports the Commission's deregulatory approach and most of its specific proposals. The ISP and the No Special Concessions rule originally protected competing U.S. carriers from whipsawing by foreign monopolists. Because of increasing competition in foreign markets, these rules are now largely unnecessary, particularly in WTO Member countries, where the opening of markets is the most pronounced.

In these markets, the ISP is worse than unnecessary; it is counterproductive. It tends to inhibit the development of fully competitive markets, resulting in fewer new entrants, less competitive pressure on prices, a lack of meaningful alternatives for consumers, and less innovation among competitors. In recent orders the Commission has begun to recognize these problems and to specify particular circumstances in which the ISP does not apply. However, narrow exceptions to the ISP are inadequate to encourage fully competitive markets, particularly where the rationale that formerly supported the ISP no longer applies. Nor do these narrow exceptions take into account the unprecedented acceleration of competition in WTO Member countries as a result of the WTO Basic Telecommunications Agreement. Accordingly, the biennial review

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[1] *1998 Biennial Regulatory Review – Reform of the International Settlements Policy and Associated Filing Requirements,* IB Docket No. 98-148, Notice of Proposed Rulemaking, FCC 98-190 Aug. 6, 1998).

requirement of Section 11 of the Communications Act affords the Commission a much-needed opportunity to reexamine the ISP.

SBC applauds the Commission for its tentative conclusions which recognize that the interests of U.S. carriers and ratepayers favor competition over government regulation in international markets. We have some concern, however, about (1) grooming arrangements and (2) arrangements between U.S. carriers and their foreign affiliates. When addressing these issues, the Commission should adopt competitively neutral rules. All non-dominant U.S. international carriers, including the long distance affiliates of incumbent local exchange carriers (ILECs), should be allowed to accept groomed traffic. Likewise, the Commission should not promulgate rules that unnecessarily favor one form of market entry over another. Carriers who choose to enter international markets through foreign investments should not be hobbled by rules that unnecessarily single out foreign affiliates for burdensome regulation, particularly where the affiliate does not possess market power in the foreign market.

A brief summary of SBC's comments follows:

<u>The ISP.</u>

SBC agrees with the Commission's proposal not to apply the ISP to--

(1) arrangements between U.S. carriers and foreign carriers that lack market power in WTO member countries; and

(2) arrangements between U.S. carriers and foreign carriers in WTO Member countries to which the Commission authorizes U.S. carriers to provide international simple resale (ISR), regardless of whether the foreign carrier possesses market power.

Where the ISP does not apply, carriers should not be required to file contracts or other accounting rate information other than an instrument (1) stating that the carrier has entered into an arrangement with a foreign carrier, (2) identifying the route, and, (3) where applicable, certifying that the foreign carrier does not possess market power in the foreign market.

The Flexibility Policy.

SBC agrees with the Commission's proposal to limit the filing of commercial information on routes that qualify for flexibility. SBC also agrees with the Commission's proposal to retain its competitive safeguards for alternative arrangements affecting more than 25 percent of the outbound or inbound traffic on a particular route. However, the Commission should retain its safeguards for arrangements between affiliated carriers and carriers involved in non-equity joint ventures only where the foreign affiliate or joint venturer possesses market power.

ISR Rules.

SBC supports the Commission's efforts to explore mechanisms that would permit it to expand ISR, while maintaining its steadfast commitment to prevent one-way bypass. The Commission should move cautiously, however, recognizing that, as a practical matter, it will be much easier for the Commission to authorize ISR on new routes than for it to revoke that authorization, once granted.

Competitive Safeguards.

Subject to the development of narrowly tailored competitive safeguards, the No Special Concessions rule should have no broader scope than the ISP. The No Special Concessions rule is unnecessary in competitive markets and inhibits innovation and aggressive negotiating. To address concerns about specific kinds of anticompetitive behavior that lifting the No Special Concessions rule might encourage, the Commission should impose safeguards tailored precisely to address those concerns, rather than using the No Special Concessions rule's broad brush. Alternatively, the No Special Concessions rule should apply only to exclusive arrangements affecting facilities, services, or functions in the particular markets in which the foreign carrier has market power.

The Commission should permit grooming arrangements in all situations to which the ISP does not apply. The Commission should impose no greater restrictions on ILECs than on other companies that enter into grooming arrangements.

Procedural Changes.

SBC supports the Commission's proposal to subject all accounting rate filings to a single set of modification procedures (eliminating the option of filing an accounting rate notification currently applicable in limited circumstances). SBC also supports replacing the current paper filing system and service requirements for accounting rate modifications with an electronic filing system (but only if the electronic system contains all relevant information, is readily accessible, and includes an updated display of new filings).

II. THE INTERNATIONAL SETTLEMENTS POLICY.

In traditional, single-carrier markets, the ISP and related rules (such as the No Special Concessions rule and the requirement that all accounting rate agreements be filed with the Commission and made public) served a valuable purpose. Under the historical paradigm, multiple private U.S. carriers had no choice but to negotiate directly with foreign governmental or quasi-governmental carrier to exchange international traffic. In this situation, the foreign entity had a surfeit of negotiating power and the ability to "whipsaw" U.S. carriers against each other. The foreign entity could extract stiff concessions from the U.S. carriers, typically in the form of high settlement rates, which would ultimately result in U.S. consumers paying high rates for international telecommunications services. The ISP and related rules prevented foreign correspondents from whipsawing U.S. carriers by requiring the nondiscriminatory treatment of U.S. carriers as to the accounting rate and the division of tolls, the proportionate return of inbound traffic and the public filing of all arrangements.

However, recent years have seen an increase in competition in foreign markets for both domestic (i.e., within the foreign country) and international services. In these increasingly competitive markets, not only does the rationale for applying the ISP and related rules no longer apply, but these rules actually undermine the very public interest they were designed to serve. In particular, as the Commission has found on several recent occasions, the ISP retards the development of competition in U.S. international service markets in a number of ways. First, the ISP reduces carriers' incentives to negotiate for lower settlement rates, because regardless of how aggressively a carrier negotiates it knows it will not be able to negotiate a settlement rate lower than a competitor. Second, the ISP's proportionate return requirement makes it difficult for new carriers to enter the market because they have no record of, and thus receive no initial proportionate return of, inbound traffic to offset the costs of terminating outbound traffic. Third, the ISP inhibits competition at the retail level by placing all carriers on notice of a significant component of the cost of service.[2]

Recognizing that the ISP inhibits competition, the Commission has carved out exceptions to the policy in narrow circumstances. The Commission's ISR Order,[3] Flexibility Order,[4] and Foreign Participation Order[5] have each played a role in eroding the ISP with exceptions. While these exceptions highlight the fact that the ISP is becoming increasingly outmoded, they are not adequate to prevent the ISP from inhibiting the full development of competition in the U.S. international services market.

As the Commission recognizes, the WTO Basic Telecommunications Agreement is accelerating the global trend toward privatization and liberalization of telecommunications markets. With over 28 WTO Member countries introducing competition for telecommunications services as of January 1, 1998,[6] and many others committing to do so over the next few years, the ISP is becoming out of step with an increasing portion of the marketplace. Narrow exceptions are no longer adequate to address the realities of the world market. New market realities call for new rules.

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[2] *See, e.g., Notice* at ¶ ¶ 9-11.

[3] *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, First Report and Order, 7 FCC Rcd 589 (1991) ("*ISR Order*") (authorizing the provision of switched basic services over resold international private lines under certain conditions).

[4] *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, Fourth Report and Order, 11 FCC Rcd 20063 (1996) ("*Flexibility Order*") (establishing a procedure for permitting alternative arrangements where the foreign market is open to competition).

[5] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Dockets 97-142 and 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 19806 (1997) *recon. pending ("Foreign Participation Order")* (adopting a presumption in favor of flexible arrangements, and removing the equivalency test as a requirement for authorizing ISR, for service to WTO Member countries).

[6] *Notice* at ¶ 15.

A. THE COMMISSION SHOULD ADOPT ITS PROPOSAL NOT TO APPLY THE ISP TO ARRANGEMENTS WITH FOREIGN CARRIERS LACKING MARKET POWER IN WTO MEMBER COUNTRIES.

SBC supports the Commission's decision not to apply the ISP to foreign carriers lacking market power in WTO Member countries. Where a foreign correspondent lacks market power, it also lacks the ability to whipsaw U.S. carriers, because of the availability of alternate providers. Thus, the ISP is unnecessary in these circumstances.

The Commission requested comment on whether there would be circumstances in which whipsawing could still pose a threat even where a foreign carrier lacks market power, as a result of government policies or peculiar market conditions that preclude genuine competition. As a practical matter, such a situation would arise infrequently in a WTO Member country. Further, under the controlling definition, a foreign carrier's possession of less than a 50 percent market share creates only a presumption that the foreign carrier lacks market power, which a carrier may rebut with a "full-fledged analysis of the foreign carrier's market power."[7] If peculiar market conditions or anticompetitive government policies preclude competition in the foreign market, the Commission should find that the foreign carrier possesses market power regardless of market share.

Although it is possible that some foreign carriers with less than 50 percent market share will be classified erroneously as lacking market power even though market

[7] *Id.* at ¶ 22, n 32.

conditions or government policies preclude competition in the foreign market, there is no reason to believe that these situations will be common. Nor is there any reason to believe that anticompetitive practices, if any, could not be detected by competing U.S. carriers and addressed by the Commission. On balance, therefore, the benefit to the public interest of unleashing competitive pressures outweighs substantially the relatively infrequent – and correctable -- instances in which harm to U.S. interests might occur.

B. THE COMMISSION SHOULD ADOPT ITS PROPOSAL NOT TO APPLY THE ISP TO ARRANGEMENTS BETWEEN U.S. AND FOREIGN CARRIERS IN WTO MEMBER COUNTRIES TO WHICH U.S. CARRIERS ARE AUTHORIZED TO PROVIDE ISR

SBC also supports the Commission's tentative conclusion not to apply the ISP to arrangements between U.S. and foreign carriers in WTO member countries to which the Commission authorizes U.S. carriers to provide ISR. The Commission authorizes U.S. carriers to provide ISR to a WTO Member country only if (1) the country offers equivalent resale opportunities, or (2) 50 percent of the traffic is settled at or below benchmark rates. As the Commission tentatively concluded, the availability of low (i.e., below benchmark) settlement rates and the ability to use ISR to terminate calls on the foreign route significantly diminish the risk that whipsawing will occur.[8] Additionally, lifting the ISP on routes where U.S. carriers may offer ISR would place substantial downward pressure on settlement rates, without a reduction in the Commission's commitment against one-way bypass.

[8] As a practical matter, both conditions under which the Commission authorizes ISR are generally satisfied when one of them is: *i.e.*, in countries that permit ISR, typically more than 50% of the traffic is settled at rates below the benchmark and *vice versa*. Nevertheless, SBC agrees with the Commission that when either condition is met, the benefits of eliminating the ISP outweighs the costs of retaining it.

SBC urges the Commission not to adopt the "best practices" rate as a more stringent threshold rate for lifting the ISP on a route-specific basis. In authorizing ISR where 50 percent or more of the traffic on a route is settled at or below benchmark rates, the Commission has gone to great lengths to say that this condition ensures the availability of reasonably low-cost alternatives for U.S. carriers to terminate traffic in the particular foreign country.[9] The lower "best practices" rate would create too stringent a condition for lifting the ISP, would send inconsistent signals to the international market and would be unnecessary to ensure the availability of reasonably low-cost alternatives.

C. THE COMMISSION SHOULD ADOPT ITS PROPOSAL NOT TO REQUIRE CARRIERS TO FILE CONTRACTS OR OTHER SETTLEMENT RATE INFORMATION IN SITUATIONS TO WHICH THE ISP DOES NOT APPLY.

The Commission requested comment on the extent to which it should require U.S. carriers to file contracts or other settlement rate information in situations to which the ISP does not apply under the proposed carrier-specific and market-specific exceptions to the ISP. The Commission correctly pointed out that, if Commission oversight (in the form of the ISP) is eliminated, such filings serve little purpose. The Commission also acknowledged that public disclosure of contract terms and settlement rate information provides a form of price signaling, which leads to oligopolistic pricing trends, to the detriment of U.S. carriers and consumers.[10] To promote competitive pricing, the

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[9] *International Settlement Rates*, IB Docket 96-261, Report and Order, 12 FCC Rcd 19806 at ¶ 244 (1997) (*"Benchmarks Order"), recon. pending, appeal filed, Cable & Wireless et al. v. FCC*, No. 97-1612 (D.C. Cir. filed Sept. 26, 1997); *see also Foreign Participation Order* at ¶ 82.

[10] *Notice* at ¶ ¶ 21, 30.

Commission should not compel parties to disclose the terms of their arrangements to competitors.

Nevertheless, there is one consideration about which the agency remains concerned: if the filing requirements are removed under the carrier-specific exception the ISP, how can the Commission (or other interested parties) determine that the foreign carrier lacks market power? The agency suggested three alternatives: (1) require filing of neither the arrangement nor anything to substantiate the "without market power" assertion; (2) require the carrier to identify the route and file a certification that the foreign carrier lacks market power, without revealing the identity of the foreign carrier; or (3) require the carrier to identify the foreign carrier and either publicly file data indicating market share or request a declaratory ruling (possibly on a confidential basis).[11]

SBC supports the second of the three: requiring the carrier to identify the route and file a certification that the foreign carrier lacks market power. The certification requirement makes U.S. carriers fully accountable. Disclosing that the parties have entered into a settlement agreement and identifying the route to which the agreement applies provides the Commission and competing carriers with sufficient information to determine whether to question a certification that the foreign carrier lacks market power.

In the vast majority of cases, the question of whether a foreign carrier has market power will be clear cut, because most foreign markets consist of an incumbent with a

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[11] *Id.* at ¶ 23

market share far greater than 50 percent and new entrants with market shares far less than 50 percent.[12] In rare cases, however, the issue of whether a foreign carrier has market power may present a close question. To address those cases, the FCC should permit a carrier to petition the FCC for an expedited declaratory ruling on whether a foreign carrier has market power.

III. THE FLEXIBILITY POLICY

A. THE COMMISSION SHOULD ADOPT ITS PROPOSAL TO LIMIT THE FILING OF COMMERCIAL INFORMATION ON ROUTES THAT QUALIFY FOR FLEXIBILITY.

Under the Commission's current flexibility rules, carriers seeking to implement an alternative arrangement must first file a petition for declaratory ruling with the Commission, which must include a summary of the terms and conditions of the arrangement.[13] Additionally, Rule 43.51 requires carriers to file copies of all settlement arrangements, including alternative settlement arrangements.[14] Under the Commission's proposed modifications, a U.S. carrier seeking to implement an alternative arrangement with a carrier from a WTO-Member country would not be required to file a summary of the terms and conditions of the agreement, would not be required to identify the foreign correspondent, and would not be required to file the agreement with the Commission. Instead, the carrier would file a petition certifying that the arrangement does not trigger the flexibility safeguards and identifying the destination market. Other parties would

[12] *Id.* at ¶ 11.

[13] 47 C. F. R. 64.1002 (1998).

[14] 47 C. F. R. § 43.51 (1998).

then have the right to file comments to rebut the presumption in favor of flexibility (by demonstrating that there are not multiple facilities-based competitors capable of terminating international traffic in the foreign market), but not to comment on the nature of the alternative arrangement itself.[15]

SBC supports this proposal.[16] The current filing requirements tend to inhibit carriers from negotiating alternative settlement arrangements, because of the likelihood that arrangements that are the product of aggressive and innovative negotiations will quickly become standard fare on the route, once the arrangements have been made public. U.S. carriers have less incentive to negotiate aggressively, because of the likelihood that their competitors would negotiate an arrangement containing the same or even preferable terms by using information that is ordinarily confidential in a competitive market. Moreover, disclosing the substantive terms of alternative arrangements can result in spurious, ill-conceived complaints from competitors that consume administrative resources of the Commission and delay the implementation of pro-competitive arrangements. By modifying the flexibility policy so that parties need not disclose the terms of their arrangement, the Commission would encourage U.S. and foreign carriers to negotiate aggressively for innovative arrangements and discourage carriers from attempting to use the Commission's regulatory processes to gain competitive advantages.

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[15] *Notice* at ¶ 35.

[16] As the Commission recognizes, its proposed modifications to the flexibility policy will not be needed, or at least will be less important, if it adopts the proposed changes to the ISP. *Notice* at ¶ 36. For the reasons discussed in these Comments, the Commission should eliminate the ISP in the circumstances proposed in the Notice. However, for those routes on which the ISP remains in effect, the flexibility policy provides an important regulatory alternative for U.S. carriers.

B. THE COMMISSION SHOULD ELIMINATE THE AFFILIATE SAFEGUARD WHERE THE FOREIGN AFFILIATE LACKS MARKET POWER, BUT OTHERWISE RETAIN ITS COMPETITIVE SAFEGUARDS.

The Commission proposes to retain its flexibility safeguards, with the possible modification of its affiliate and joint-venture safeguards. Under the flexibility safeguards, (1) alternative arrangements affecting more than 25 percent of the outbound or inbound traffic on a route must be publicly filed and may not contain unreasonably discriminatory terms; and (2) alternative arrangements between affiliated carriers and carriers involved in non-equity joint ventures must be publicly filed.[17] Although the Commission tentatively concludes that it will retain its flexibility safeguards, it seeks additional comment on whether it should eliminate the safeguard applicable to affiliated carriers and non-equity joint-venture partners where the affiliated carrier or joint-venture partner lacks market power in the foreign market. SBC supports such a modification.

The Commission's rules should not disfavor U.S. carriers who choose to enter international markets through investing in foreign carriers. The Commission, together with the Executive Branch, has worked diligently over the years to convince foreign governments to open their telecommunications markets to U.S. entry and investment. With the successful conclusion of the WTO Basic Telecommunications Agreement, those efforts have recently borne fruit. SBC is but one of many U.S. carriers moving into foreign markets to take advantage of the opportunities won for U.S. industry by the Commission's determined efforts. The Commission should not single out such carriers for special regulatory restrictions unless sound reasons for additional regulation are demonstrably present.

Here, the safeguards to the flexibility policy are intended to "protect against potential anticompetitive actions by foreign and U.S. carriers with a significant share of their markets."[18] By definition, however, if a foreign carrier lacks market power, it cannot adversely affect competition in the U.S. market.[19] Thus, as the Commission observed, there is little danger that a flexible arrangement would have anticompetitive effects.[20] Risk of anticompetitive effects is further minimized by the fact that the 25 percent safeguard would apply to any arrangement involving a significant share of traffic. Thus, there is no reason to retain the affiliate safeguard where the affiliate lacks market power.[21]

With the modification of the affiliate safeguard, SBC supports the Commission's proposal to retain its competitive safeguards. If the Commission adopts its proposal to lift the ISP in certain carrier- and market-specific situations, the flexibility policy would apply only to arrangements involving non-WTO Member countries and to arrangements where the foreign carrier possesses market power on a route that the Commission has not authorized for ISR. In these limited situations, there is a significant risk that

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[17] *Id.* at ¶ 34.

[18] *Id.* at ¶ 34.

[19] *Id.* at ¶ 20.

[20] *Id.* at ¶ 34.

[21] If the Commission adopts its proposal to lift the ISP in WTO Member countries where the foreign carrier lacks market power, the point is moot: the affiliate safeguard would not come into play unless the foreign carrier possessed market power.

arrangements involving more than 25 percent of a route's traffic or involving an arrangement with an affiliate or joint-venture partner with market power could adversely affect competition in the U.S. Thus, subject to the modification we propose to the affiliate safeguard, the Commission should retain its flexibility safeguards.

IV. THE ISR RULES.

The Commission seeks comment on whether it should modify its ISR rules to place additional downward pressure on settlement rates, and, if so, how it might do so consistently with its commitment against one-way bypass. Although the Commission states no tentative conclusions, the Notice contains ideas for directions that such proposals might take, including (1) permitting limited quantities of ISR traffic on routes that do not qualify for ISR traffic generally, (2) determining in advance to lift the ISR requirement when international markets have become sufficiently competitive overall, and (3) moving toward a greater reliance on sanctions to deter foreign carriers from engaging in one-way bypass, while permitting ISR on a greater number of routes.[22]

SBC supports the Commission's efforts to explore mechanisms that would permit it to expand the current routes on which ISR is authorized, but is uncertain how the Commission might do so while retaining its steadfast commitment against one-way bypass. Permitting ISR in limited quantities or on a trial basis may sound reasonable, but SBC is concerned about practical problems of implementation and enforcement. For example, under the proposed "limited quantities" approach, how would the amount of permissible ISR traffic be determined, allocated among carriers, and monitored?

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[22] *Id.* at ¶ 38.

Moreover, despite the Commission's announced intentions, the impracticality of revoking authorization once ISR is permitted on a route could well result in the Commission's tolerating excessive levels of market distortion.[23] The theoretical availability of remedial measures to address market distortions may prove inadequate to protect U.S. interests.

The availability of ISR will expand substantially if the Commission adopts its proposal to lift the ISP for arrangements with foreign carriers lacking market power in WTO Member countries. SBC supports this proposal, including the expansive use of ISR that would almost certainly result from the lifting of the ISP. Alternatively, if the Commission were to decide ultimately not to adopt its ISP proposal, it should at least modify its rules to authorize ISR arrangements with foreign carriers that lack market power in WTO Member countries.

The Commission also asked for comment on whether, to place additional downward pressure on settlement rates, the Commission should decide in advance to lift the ISP when international markets have become sufficiently competitive overall. By way of example, the Commission suggested that it might decide in advance to lift the ISP when the Commission has authorized ISR in 50 percent of all markets.

SBC supports the eventual lifting of the ISP when the market becomes sufficiently competitive overall. However, SBC questions whether it would be prudent to specify in advance a threshold figure that would trigger lifting the ISP in all markets. The international market is volatile, as world events demonstrate. The liberalization of

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[23] One-way bypass tends to increase the net settlement payments of U.S. carriers, offsetting the lower settlement rates that the availability of ISR may generate, resulting ultimately in higher prices for

the international telecommunications market is taking place at an unprecedented pace. Yet with unprecedented change also comes a high degree of instability. If present trends continue, by the time the Commission authorizes ISR in 50 percent of all markets, those combined markets would likely involve over 90 percent of the traffic. At that point in time, it is likely that competition will have already caused the settlement rate system to collapse, at which time the Commission undoubtedly should—and would—lift the ISP. Nevertheless, because changing trends might result in a significant number of "closed" markets even after ISR is authorized in 50 percent of all markets, SBC urges the Commission not to make a pronouncement of this kind in advance, but to use that event as a trigger to institute an expedited proceeding to consider the appropriateness of lifting the ISP in all markets.

V. COMPETITIVE SAFEGUARDS.

A. THE COMMISSION SHOULD LIMIT THE SCOPE OF THE "NO SPECIAL CONCESSIONS" RULE.

The Commission seeks comment on the extent to which it should continue to apply its "No Special Concessions" rule to arrangements to which the ISP will no longer apply. SBC supports a rule lifting the No Special Concessions rule in all such circumstances, while imposing appropriate safeguards to protect against anticompetitive conduct. Doing so would be logically consistent with the rationale for lifting the ISP and would provide U.S. carriers the flexibility they need to negotiate aggressively for foreign traffic in competitive markets. The continued application of the No Special Concessions rule in these circumstances would be both unnecessary and counter-productive.

U.S. customers. *Id.* at ¶ 37.

The Commission's No Special Concessions rule does not apply to arrangements in which the foreign carriers lack market power.[24] Thus, absent an expansion of the rule, the No Special Concessions rule would not apply to an arrangement with a foreign carrier without market power in a WTO Member country. For the Commission no to apply the No Special Concessions rule in these circumstances would be reasonable, because a foreign carrier without market power can rarely, if ever, adversely affect U.S. interests—a carrier cannot whipsaw U.S. carriers because of the alternatives that exist in the market.

Likewise, in the great majority of situations in which the Commission (under its proposal) would lift the ISP because the arrangement is on a route with respect to which ISR is authorized, the potential for whipsawing or other anticompetitive conduct by the foreign carrier is small. First, the fact that over 50 percent of all traffic is settled at or below benchmark rates demonstrates that U.S. carriers can terminate their traffic at reasonable rates. Second, the very fact that the Commission authorizes ISR on the route makes it likely that a substantial amount of traffic on the route is already being carried outside the traditional correspondent system. Thus, the No Special Concessions Rule is unnecessary in these circumstances as well.

Like the ISP, the No Special Concessions rule tends to inhibit competition in markets where competition is developing. A carrier's ability to negotiate aggressively – in any market -- turns on its ability to engage in quid pro quo exchanges over a broad range of terms and conditions. U.S. carriers adopting global strategies need to be able to come to the bargaining table at the moment an opportunity arises, to negotiate terms and

[24] *Foreign Participation Order* at ¶¶ 150-170.

conditions with individual carriers, and to enter a legally binding agreement without the limitations of either the ISP and No Special Concessions rule. Absent the lifting of the No Special Concessions Rule in situations where the ISP does not apply, U.S. carriers will not have adequate freedom to negotiate with foreign carriers for the exchange of international traffic. Thus, a measure intended to protect U.S. carriers would instead prevent them from successfully negotiating efficient arrangements for handling their international calls.

Alternatively, to the extent the Commission decides to retain the No Special Concessions rule in circumstances in which it lifts the ISP, SBC suggests that the rule be narrowed or clarified in two respects. First, for the reasons stated in the Notice,[25] SBC endorses the Commission's tentative conclusion that the No Special Concessions rule does not apply to the terms and conditions under which traffic is settled, including allocation of return traffic, on an ISR route.

Second, under the Commission's present rules there are three relevant markets for determining whether a foreign carrier possesses market power on the foreign end of a U.S. international route: international transport facilities and services; intercity facilites and services; and local access facilities and services.[26] A foreign carrier with more than a 50 percent share in any of these three markets is deemed to possess market power on the route. However, a foreign carrier may have market power in one or two of the markets,

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[25] *Notice* at ¶ 41.

[26] *Id.* at ¶ 22, n. 31.

but not all three.[27]

The No Special Concessions rule should only apply to exclusive arrangements affecting facilities, services, or functions in the particular markets in which the foreign carrier actually has market power. Under this approach, a foreign carrier with market power in the local access market on the foreign end, but not in the intercity or international transport markets, would be subject to the No Special Concessions rule only with respect to interconnection, provisioning, and similar arrangements for local access services. Because, in this example, the foreign carrier lacks market power in the provision of intercity or international facilities and services, there is no reason to regulate those portions of its arrangements with U.S. carriers dealing with those two markets. Limiting the No Special Concessions rule in this fashion would eliminate unnecessary and anticompetitive restrictions on U.S. carriers' ability to negotiate efficient arrangements for the exchange of international traffic with foreign carriers.

B. THE COMMISSION SHOULD PERMIT ARRANGEMENTS TO ACCEPT "GROOMED" TRAFFIC.

The Commission should permit all U.S. carriers, including incumbent local exchange carriers, to arrange for "groomed" inbound traffic. Allowing U.S. carriers to negotiate arrangements to accept traffic that terminates in certain geographic regions conforms to the Commission's goals in this rulemaking, is consistent with other

[27] While, at present, in many countries a single foreign carrier has market power in all three relevant markets, that is not the case everywhere (e.g., in Japan). Moreover, as competition develops, it is likely that dominant foreign carriers will lose market power more rapidly in some markets than in others.

Commission policies, makes good business sense, and serves the public interest. Moreover, grooming warrants no exception to the agency's proposed relaxation of the ISP, which would deny grooming benefits to carriers and their customers.

The same pro-competitive reasons that support the Commission's proposal not to apply the ISP in certain circumstances support permitting U.S. carriers to receive "groomed" inbound traffic. Indeed, the geographic allocation of inbound traffic is precisely the kind of arrangement that the Commission should seek to encourage because it will result in lower consumer rates.[28] By clarifying that the relaxation of the ISP also covers grooming, the Commission will enable inbound traffic to be distributed to U.S. carriers in an economically efficient manner, reduce U.S. carriers' costs associated with the termination of inbound traffic and permit lower prices for consumers' international long distance calls. In contrast, prohibiting grooming artificially imposes market constraints and increases the cost of terminating traffic to the detriment of U.S. consumers.

Allowing grooming is also consistent with the Commission's plan to "de-link" the two carrier markets: inbound and outbound. One of the primary goals of the Commission's Flexibility Order was to create separate inbound and outbound traffic markets.[29] Indeed, the Commission was concerned that the ISP tied those markets together in a manner that inhibited competition. So, the Commission adopted a policy to

[28] The Commission has previously acknowledged that the grooming of return traffic "may ultimately reduce U.S. carrier costs." *Regulatory Treatment of LEC Provision of Interexchange Services*, 12 FCC Rcd 15756, 15,837-39 (1997) ("*LEC Regulatory Treatment Order*").

[29] *Regulation of International Accounting Rates, Phase II*, CC Docket 90-337, Fourth Report and Order, 11 FCC Rcd 20063 (1996), *recon. pending* (*Flexibility Order*).

allow alternative arrangements that would "encourage[] the development of a separate competitive market for termination services."[30] In this proceeding, the Commission would further encourage competition in those markets by removing applicability of the ISP to certain markets. Grooming is an important element in developing such competition.[31]

The Commission has tentatively concluded, and SBC agrees, that the No Special Concessions rule does not apply to the terms and conditions under which traffic is settled, including allocation of return traffic, by any U.S. carrier on an ISR route.[32] Because grooming is an element of the allocation of return traffic, it would not be subject to the No Special Concessions rule under the FCC's interpretation of the No Special Concessions rule.

At a minimum, the No Special Concession rule should not, and cannot legally, be used to continue to impose a grooming restriction solely on Bell Operating Companies ("BOCs"). Without particularized findings of fact, it is impermissible to place restrictions on BOC affiliates that do not apply to all carriers.[33] In this case, there is no logical nexus between any residual local exchange dominance and the termination of in-

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[30] *Id.* at ¶ 19.

[31] Indeed, U.S. carriers operating in niche markets already groom traffic to the benefit of U.S. consumers.

[32] *Notice* at ¶ 41.

[33] *Cincinnati Bell v. FCC*, 69 F.3d 752, 758 (6th Cir., 1995) ("In the absence of a reasoned explanation as to why the structural separation rules remain viable for Bell Company cellular providers . . . the FCC should reexamine whether the structural separation requirement placed on the Bells still in any way serves the public interest.")

bound in-region traffic.

The Commission has found that an ILEC's termination of out-of-region, domestic traffic raises no special competitive concerns that would warrant the imposition of dominant carrier regulation or even separate affiliate requirements.[34] The same conclusion should apply to an ILEC's termination of international services. Indeed, the Commission recognized as much when it concluded, with respect to in-region originating services, that "no practical distinctions exist between a BOC's ability and incentive to use its market power in the provision of local exchange and access services to ... disadvantage unaffiliated domestic interexchange competitors as opposed to international service competitors."[35] Accordingly, BOCs should not be treated any differently than other U.S. carriers with respect to grooming: grooming serves the public interest, and grooming by BOCs raises no unique competitive concerns.

After two years of considering this question in a half dozen proceedings, the record still reflects no legitimate rationale for treating grooming any differently than other arrangements under the ISP or No Special Concessions rule. Moreover, no party has put forward evidence of the need for any pre-entry prophylactic remedy against any hypothetical anticompetitive conduct. The FCC already has the authority to address complaints regarding common carrier activities using the process established by Section 208 of the Communications Act. Thus, the Commission should seize the opportunity presented by the rapid changes occurring in the international telecommunications

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[34] *LEC Regulatory Treatment Order*, at ¶ ¶ 206-213.

[35] *Id.* at ¶ 138.

marketplace and this rulemaking, to affirm that grooming is not anticompetitive.[36]

VI. CONCLUSION

Significant opportunities are on the horizon for U.S. carriers adopting global strategies. These opportunities are available, however, only for carriers who have the regulatory freedom to negotiate aggressively with their foreign counterparts on the full panoply of terms and conditions in the parties' operating agreements. SBC applauds the Commission's deregulatory approach to the international settlements process, particularly its tentative conclusion to lift the ISP in WTO member countries where the foreign correspondent lacks market power and where the arrangement involves a route on which the Commission authorizes ISR. Additionally, SBC urges the Commission to make its decision to lift the ISP an effective means of promoting competition by lifting the No Special Concessions rule in all situations where it lifts the ISP, subject to appropriate safeguards; alternatively, the No Special Concessions rule should apply only to exclusive arrangements affecting facilities, services, or functions in the particular markets in which the foreign carrier has market power. SBC also urges the Commission not to place unnecessary burdens on U.S. carriers that choose to do business internationally through foreign affiliates or non-equity joint ventures: the Commission should eliminate the competitive safeguard applicable to, and not impose additional filing requirements on arrangements involving, foreign affiliates or non-equity joint ventures that lack market

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[36] *See id.* (declining to find grooming "anticompetitive *per se*").

power. Finally, the Commission should recognize that grooming arrangements are generally pro-competitive and efficient and should not impose special restrictions on grooming.

Respectfully submitted,

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September 16, 1998

CERTIFICATE OF SERVICE

I, Steven D. Strickland, hereby certify that a copy of the foregoing "Comments of SBC Communications Inc." in CC Docket No. 90-337 was served on the parties on the attached sheet.

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September 16, 1998

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